Office Supreme Court, U.S.
FILED
APR 18 1963
JOHN F. DAVIS CLERK

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 1026

STANLEY BLUMENTHAL, RUDOLPH WILLIAM JONES and WAYNE P. PASCHAL,

*Petitioners,*

*against*

UNITED STATES OF AMERICA and THE FEDERAL COMMUNICATIONS COMMISSION

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
30 East 42nd Street,
New York 17, N. Y.,
*Attorneys for Petitioners.*

April 15, 1963

# INDEX


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 5 |
| REASONS FOR GRANTING THE WRIT | 7 |
| CONCLUSION | 16 |
| EXHIBIT A | 17 |
| EXHIBIT B | 24 |
| **Cases:** | |
| Allgeyer v. Louisiana, 165 U. S. 578 | 7 |
| Borrow v. F.C.C., 285 F. 2d 666, Cert. den. 364 U. S. 892 | 6, 9, 12 |
| Briehl v. Dulles, 248 F. 2d 561 Rev'd 357 U. S. 116 | 14 |
| Butchers Union Co. v. Crescent City Co., 111 U. S. 746 | 7 |
| Chapman v. El Paso Natural Gas Co., 204 F. 2d 46 (C.A.D.C., 1953) | 9 |
| Cronan v. F.C.C., 285 F. 2d 288, Cert. den. 366 U. S. 904 | 6, 9, 12 |
| Cummings v. Missouri, 4 Wall (71 U. S.) 277 | 7 |
| Federal Trade Commission v. Bunte Bros. Inc., 312 U. S. 349 | 9 |
| Graham v. Richmond, 272 F. 2d 517 (C.A.D.C., 1959) | 7 |
| Greene v. McElroy, 360 U. S. 474 | 7 |

PAGE

Kent v. Dulles, 357 U. S. 116 ..... 7, 8, 15

Kim v. Rosenberg, 363 U. S. 405 ..... 13

Konigsberg v. State Bar of California, 353 U. S. 252 14, 15

Konigsberg v. State Bar of California, 366 U. S. 36 15

Matter of Lafferty, 23 F.C.C. 761 ..... 8

Meyer v. Nebraska, 262 U. S. 390 ..... 7

Mintz v. Baldwin, 289 U. S. 346 ..... 9

National Association for the Advancement of Colored People v. Alabama, 357 U. S. 449 ..... 12

Orloff v. Willoughby, 345 U. S. 83 ..... 13

Parker v. Lester, 227 F. 2d 708 (C.A. 9, 1955) .... 7

Speiser v. Randall, 357 U. S. 513 ..... 12

Stewart v. Dulles, 248 F. 2d 602 ..... 15, 16

Sweezy v. New Hampshire, 354 U. S. 234 ..... 12

Thomas v. Collins, 323 U. S. 516 ..... 12

Truax v. Raich, 239 U. S. 33 ..... 7

Watkins v. U. S., 354 U. S. 178 ..... 12

West Virginia Bd. of Ed. v. Barnett, 319 U. S. 624 12

**Constitution:**

Article 1, Section 9 ..... 2, 3

First Amendment ..... 2, 3, 12, 14

Fifth Amendment ..... 2, 3, 5, 6, 12, 14, 15

PAGE

**Statutes:**

28 U. S. C. § 1254 ..... 2

Communications Act of 1934, 47 U. S. C. § 151 et seq. 48 Stat. 1064 ..... 2, 3

47 U. S. C. § 151 ..... 3

47 U. S. C. § 303 (l) (m) ..... 3, 4, 8, 10, 12

47 U. S. C. § 402 (j) ..... 2

Public Law 351, 77th Cong. ..... 11

Radio Act of 1927, 44 Stat. 1164 ..... 8

**Congressional Material:**

87 Cong. Rec. 6239, 77th Cong., 1st Sess. ..... 11

Federal Communications Commission, Annual Report, 1961 ..... 8

Hearing on H.R. 2662, House Committee on Merchant Marine & Fisheries, 77th Cong., 1st Sess. .. 10

Hearing on H.R. 5074, Senate Committee on Commerce, 77th Cong., 1st Sess. ..... 11

H.R. 10446, 76th Cong. ..... 10

H.R. 2662, 77th Cong. ..... 10

H.R. 3364, 77th Cong. ..... 10

H.R. 5074, 77th Cong. ..... 10, 11

**Miscellaneous:**

Federal Communications Commission Docket No. 5218 ..... 9

Federal Communications Commission Docket No. 11060 ..... 9

Federal Communications Commission Docket No. 11061 ..... 9

# Supreme Court of the United States

OCTOBER TERM, 1962

No.

---

STANLEY BLUMENTHAL, RUDOLPH WILLIAM JONES and WAYNE P. PASCHAL,

*Petitioners,*

*against*

UNITED STATES OF AMERICA and THE FEDERAL COMMUNICATIONS COMMISSION

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Stanley Blumenthal, Rudolph William Jones and Wayne P. Paschal respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on March 28, 1963, affirming orders of the Federal Communications Commission (hereinafter referred to as the Commission) dated July 11, 1962 and July 19, 1962.

### Opinions Below

The opinion of the Court of Appeals is not officially reported and is appended hereto as Exhibit A, and the judgment of the Court of Appeals is appended hereto as Exhibit B. There was no opinion by the Commission.

## Jurisdiction

The date of the judgment of the Court of Appeals sought to be reviewed is March 28, 1963. It was entered on the same date. No application for a rehearing was made. Jurisdiction is conferred upon this Court by the Communications Act of 1934, as amended, 47 U. S. C. § 402(j) and by 28 U. S. C. § 1254.

## Questions Presented

1. Whether the Commission is authorized by law to require that an applicant for an operator's license fill out a questionnaire, under oath, relating to his political associations and beliefs.

2. Whether the requirement of the Commission, that an applicant for an operator's license fill out, under oath, a questionnaire relating to his political associations and beliefs abridges the First Amendment rights of speech, belief and association of the applicant, constitutes a bill of attainder and an *ex post facto* law in violation of Article I, Section 9, of the Constitution and deprives the applicant of his right to due process under the Fifth Amendment to the Constitution.

3. Whether the Commission is or may constitutionally be authorized to deny an operator's license to an applicant who denies current or recent Communist Party membership but refuses to answer questions as to the more remote past in reliance on his Fifth Amendment privilege.

## Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First and Fifth Amendments and Article I, Section 9 of the Constitution.

The statute involved is the Communications Act of 1934, 47 U. S. C. § 151 *et seq.* the relevant portions of which are:

> "Sec. 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Chapter."
>
> * * *
>
> "Sec. 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * *
>
> (l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens or nationals of the United States as the Commission finds qualified,

except that in issuing licenses for the operation of radio stations on aircraft the Commission may, if it finds that the public interest will be served thereby, waive the requirement of citizenship in the case of persons holding United States pilot certificates or in the case of persons holding foreign aircraft pilot certificates which are valid in the United States on the basis of reciprocal agreements entered into with foreign governments;

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means."

## Statement of the Case

On February 13, 1962, petitioner Blumenthal filed with the Commission, applications for radiotelegraph second class and radiotelephone first class operator's licenses; on March 7, 1962, petitioner Jones filed with the Commission, applications for radiotelegraph second class and radiotelephone first class operator's licenses; on June 7, 1962, petitioner Paschal filed with the Commission an application for an advanced class amateur operator and station license (J.A. 1a, 2a).

Thereafter the Commission sent to each of the petitioners a letter directing that he answer, under oath, the following questions:

> (1) Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership;
>
> (2) Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States, or of any political division thereof, by force or violence? If the answer is yes, list the organizations or groups and give the dates of membership. (J.A. 4a-6a)

On February 13, 1962, petitioner Blumenthal responded to the first question as follows:

> "I am not a member of the Communist Party and was not at the time I applied for a renewal of my second class radiotelegraph operator's license in 1958. As to the period prior to that date I decline to answer in accordance with the privileges granted to me under the Fifth Amendment to the Constitution of the United States."

He answered the second question in the negative (J.A. 4a).

On March 7, 1963, petitioner Jones responded to the first question as follows:

> "I am not a member of the Communist Party and was not at the time I was first requested to execute a questionnaire by the Commission."

It might be noted parenthetically that Jones was first requested to execute a questionnaire by the Commission in 1959 in connection with a prior application for a renewal of his license. He answered the second question in the negative (J.A. 5a).

On June 7, 1962, petitioner Paschal responded to the first question as follows:

> "I am not a member of the Communist Party. In view of the manner in which existing legislation has been utilized and the attitude of various governmental agencies in prosecuting and persecuting by *defacto fiat*, I must utilize my right under the Fifth Amendment of the Constitution to refuse to give comfort or aid to any inquisitorial activity regarding any past or present poli[illegible]l activity."

In response to the second question, he said: "The answer is the same as to question No. 1" (J.A. 6a).

The Commission dismissed all three applications on the ground that petitioners had failed to complete the answers to the questionnaires (J.A. 7a-10a). No issue has been raised as to the technical qualifications of the applicants. The Court of Appeals found that the reliance by petitioners on their Fifth Amendment privilege did not remove their cases from the controlling effect of its previous decisions in *Borrow* v. *F. C. C.*, 285 F. 2d 666, cert. den. 364 U. S. 892, and *Cronan* v. *F. C. C.*, 285 F. 2d 288, cert. den. 366 U. S. 904.

## Reasons for Granting the Writ

1. This Court has held that the power of an administrative agency to inquire into a person's political activities and associations will not be implied from general statutory language which broadly defines the scope of the agency's powers. Especially is this true when, as in this case, there is no administrative or legislative history to justify such inquiry.

The leading case on the subject is *Kent* v. *Dulles*, 357 U. S. 116, where the Court held that the right of an administrative agency to inquire into the political activities of an applicant for a passport will not be implied from the general language of a regulatory statute. The constitutional right to travel, involved in the *Kent* case, is no more a basic and fundamental right than the constitutional right to engage in a lawful occupation. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Meyer* v. *Nebraska*, 262 U. S. 390; *Truax* v. *Raich*, 239 U. S. 33; *Cummings* v. *Missouri*, 4 Wall (71 U. S.) 277; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955).

The language of the *Kent* case, with but few modifications, might be applied to this case; the same is true of *Greene* v. *McElroy*, 360 U. S. 474, where the Court held that the industrial security program administered by the Defense Department was invalid because there was no clear authorization, either by Congress or the President, for inquiry into the political activity and association of industrial employees. As the Court there said:

> "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." (360 U. S. at 507)

To the same effect, see *Graham* v. *Richmond*, 272 F. 2d 517 (C.A.D.C., 1959).

So here, there is no legislative or other authority for the actions of the Commission which so closely impinge on our constitutional liberties.

2. There is in the present case, as in *Kent*, an administrative practice of long standing and, furthermore, a legislative history which makes it abundantly clear that the Commission does not have the power it claims.

Sections 303(1) and (m) of the Act, which relate to the issuance and revocation of licenses, are copied directly from the Radio Act of 1927 (44 Stat. 1164). There is no evidence that the Federal Radio Commission, the predecessor of the Commission, or the Department of Commerce, which originally issued licenses to radio operators, ever applied a political test to applicants or licensees or had ever manifested any interest in their political affiliations or activities. The application forms used by the Commission since its organization do not contain any questions relating to the political activities of an applicant (J.A. 6a).[1] Except for a single instance in 1954 (*Matter of Lafferty*, 23 F. C. C. 761)[2] there is no evidence that the Commission had ever addressed such ques-

---

[1] The Commission has had ample opportunity to exercise the power it now claims. It has issued millions of licenses since its creation; there were, at the end of the fiscal year 1961, 2,282,148 licenses and permits outstanding. Over 300,000 applications are filed in an average year. (Annual Report, Federal Communications Commission, 1961, pp. 20, 133.)

[2] The Commission first submitted a political questionnaire to Lafferty in 1954. His case was widely regarded as a test case and, indeed, the Commission had it under consideration for three years before handing down an order holding that it had the authority to question applicants concerning their political affiliation. It is our understanding that Lafferty died pending an appeal from the ruling of the Commission and hence his case became moot.

tions to any applicant until 1958, when four applicants were asked the questions now at issue.[3]

There is thus a significant history of the failure of the Commission to assert the authority it now claims, at least prior to 1958. *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 352; *Mintz* v. *Baldwin*, 289 U. S. 346, 351; *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 51 (C.A.D.C. 1953). Even now, the Commission, we believe, addresses these questions to very few applicants.

It is not only on such negative evidence that petitioner relies. Both Congress and the Commission have, in the past, been in agreement that the Commission does not have the right it now asserts. Twice in its history the Commission has considered the establishment of qualifications for a license other than technical and citizenship requirements. In 1938, a proposal to modify the rules to permit the setting of "mental" and "moral" qualifications was dropped when objection was made on grounds of lack of authority. (See FCC Docket No. 5218, pp. 241, 253, 355; J.A. 9a, 10a). In 1955 a proposal was made to prohibit the issuance of radio operators' licenses to members of the Communist Party (Docket Nos. 11060 and 11061). Again, objection was made on grounds of lack of authority. Those proceedings have only recently been dismissed, having pended undetermined for about seven years (FCC Docket Nos. 11060 and 11061).

The relevant legislative history is equally significant as bearing on the Commission's lack of power. In 1940 and 1941 bills were introduced to amend the Communications Act to

[3] Two of those applicants, Borrow and Cronan, refused to answer the questions on the grounds that the Commission had neither the constitutional nor the statutory authority to ask them. When the Commission denied their applications both sought review in the Court of Appeals. The Court affirmed the decisions of the Commission and petitions for certiorari were denied in this Court. *Borrow* v. *F. C. C.*, 285 F. 2d 666, cert. den. 364 U. S. 892; *Cronan* v. *F. C. C.*, 285 F. 2d 288, cert. den. 366 U. S. 904.

give the Commission the right to refuse to issue a license to an applicant who was "subversive" and to suspend licenses of radio operators found to be "subversive". The bills (H.R. 10446, 76th Cong.; H.R. 3364, 77th Cong.) were referred to Committee and were not reported out.

In the 77th Congress, Congressman Dirksen introduced H.R. 2662, sections 107 and 108 of which provided that the Commission could deny a license to any radio operator if he were guilty of subversive activities.

Congressman Dirksen told a House Committee considering the bill that the Commission took the position that it had never inquired into the desirability of license holders in any respect other than technical qualifications and that there was no provision in the law for the revocation or denial of a license for subversive activities. Congressman Dirksen explained that his bill was intended to remedy this "defect". (Hearing on H.R. 2662, House Committee on Merchant Marine & Fisheries, 77th Congress, 1st Sess., Feb. 26, 1941, p. 10 *et seq.*)

The Dirksen bill was not reported out of Committee. However, a subsequent measure, H.R. 5074, 77th Congress, was designed to treat specially with the problem of allegedly subversive persons engaged as radio operators in the United States Merchant Marine. It proposed to amend the Communications Act to define a "subversive individual" and further to amend §§ 303(l) and (m) to prohibit the issuance of licenses for maritime service to subversive individuals and to authorize the suspension of licenses to such persons. This bill was reported favorably and was passed. Congressman Ramspeck, in discussing it on the floor of the House on July 22, 1941 said:

> "It developed that the present law does not give the Federal Communications Commission, which issues licenses to these operators, the right to make inquiry about anything except the technical qualifica-

tions of radio operators. This bill proposes to amend the Act so that they may inquire as to their character and their background.

"* * * If they find an applicant is a subversive individual or that there is a reasonable probability that he is, they can deny the applicant a license." (87th Cong. Rec. 6259, July 22, 1941, 77th Cong., 1st Sess.)

Before the Senate Committee on Commerce, a number of non-governmental witnesses testified on the House bill, all agreeing that the Commission had no power to deny licenses to "subversives". To the same effect was testimony by Admiral Hooper of the Navy Department and Secretary Stimson of the War Department (Hearing on H.R. 5074, Senate Committee on Commerce, 77th Cong., 1st Sess., pp. 71 and 75).

A memorandum was submitted to the Senate Committee by the Commission. The Commission did not discuss its lack of authority to investigate subversive activities of license holders; such lack of authority was assumed. Instead, it objected to the bill on the ground that it was not qualified to examine into the subversive activities of applicants, that its staff was not equipped for that purpose, that it had had no experience in that area, that it had no procedures which would make such investigations feasible, and that it preferred not to have the authority which the Act would give it. (Hearings, pp. 77-79.) See also a statement by the Maritime Commission, *ibid.* pages 79, 80.

The Senate thereupon abandoned H.R. 5074 and reported, instead, a bill which gave to the Navy Department the right to screen "subversives" employed as radio operators in the Merchant Marine. It further provided that this power should end with termination of hostilities. The bill was eventually enacted into law. (Public Law 351, 77th Congress)

3. There is also internal evidence within the Communications Act that the Commission does not have the power it now seeks to assert. Section 303(m) enumerates the grounds for the revocation of a license, and well known principles of statutory construction would require that such enumeration would exclude grounds not enumerated. Since political activities or membership in "subversive" organizations is not listed in subdivision (m), it would seem that the Commission does not have the power to revoke licenses for such reason. It would be anomalous that the Commission would have the right to deny a license to an applicant for reasons insufficient to justify a revocation.

4. This Court has had frequent occasion to consider the effect upon First Amendment freedoms of belief, activity and association of the kind of inquiry undertaken by the Commission in this case. The language of the Court in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, at 462, is an eloquent statement of the vice inherent in the kind of political inquiry which the Commission here seeks to make. See also *Watkins* v. *United States*, 354 U.S. 178; *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Speiser* v. *Randall*, 357 U.S. 513. It is beyond the power of government officials to determine what ideas are good or bad, or what organizations are good or bad. *West Virginia Board of Education* v. *Barnett*, 319 U.S. 624; *Thomas* v. *Collins*, 323 U.S. 516.

5. *Borrow* and *Cronan*, *supra*, both raised the question, in the Court of Appeals, of the Commission's right to put political inquiries to applicants for licenses, but this Court did not pass on the issues since certiorari was denied in both cases. This case differs from *Borrow* and *Cronan* in two respects: first, petitioners here denied current membership in the Communist Party as well as membership in the recent past and, second, petitioners Blumenthal and Paschal based their refusal to answer on grounds of their privilege under the Fifth Amendment, an element not present in the *Borrow*

or *Cronan* cases. Assuming, *arguendo*, that the Commission has authority to address political questions to applicants, the issue remains as to the procedure to be followed when the applicant, denying present membership, asserts his privilege as to past membership.

The Commission argued, and the court below held, that petitioners were not being compelled to disclose incriminatory matter—they were merely being asked to complete an application which sought ". . . information substantially relevant to [their] qualifications . . ." The court continued:

> "While . . . invocation [of the privilege] may not be considered ground for disqualification, for the privilege is available to the innocent as well as to the non-innocent, the lack of relevant information which follows in the wake of its assertion leaves a gap in data which the applicant can supply." (Court of Appeals Opinion, *infra*, p. 22.)

The court, in support of its position, cited *Kim* v. *Rosenberg*, 363 U. S. 405, and *Orloff* v. *Willoughby*, 345 U. S. 83. In neither of the cases cited was the petitioner seeking to exercise a constitutional right, *i.e.* the right to engage in a lawful occupation. Both cases involved situations in which an unusual degree of discretion was lodged in the Government agency involved.

We respectfully suggest that the court's reasoning and that of the Commission is mechanical and fails to take into consideration the political realities of our time. Whatever may be its form, the substance of the procedure adopted by the Commission results in the disqualification of an applicant who relies on his privilege. The Commission agreed on argument that an applicant who answers these questions (whether in the affirmative or the negative) will either be granted a license or a hearing on his application. The petitioners got neither. In other words, their reliance on their privilege did result in a denial to them of a consideration of their applications.

It is unreal to treat the questions put to the petitioners as routine run-of-the-mill inquiries. They were not part of the regular application form and are asked of but a very few applicants. However we may seek to justify the action of the Commission in terms of its alleged need to get information to judge the qualifications of an applicant, the effect is to bar from the industry those who rely on their privilege in refusing to testify as to their political past. In the Court of Appeals decision in *Briehl* v. *Dulles*, 248 F. 2d 561 (reversed by this Court at 357 U. S. 116), Judge Fahy dissented because, on similar facts he construed "the factual situation as amounting to an actual denial of appellant's application on the ground that he refused to file" a statement as to his political association. We suggest that his dissenting opinion in that case is better reasoned than his majority opinion in this one.

The ruling of the Court of Appeals seems directly contrary to the decision of this Court in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, in which the Court held that the State Board of Bar Examiners could not, without violating the due process clause of the Constitution, draw an adverse inference as to character from a refusal to answer a question which was privileged.

Indeed, the position of petitioners is much stronger than that of Konigsberg. Admission to the bar calls for a much higher standard of character and fitness than employment as a radio operator, and courts have traditionally exercised extremely wide power over admission to the bar. The Commission, on the other hand, is seeking to exercise extraordinary powers in circumstances in which it had traditionally abstained from the assertion of such power. It will furthermore be noted that Konigsberg relied only on the First Amendment in his refusal to answer, whereas petitioners here rely on their privilege under the Fifth Amendment. Yet there is no doubt that in effect, if not in form, the Commission's ruling violated the holding of *Konigsberg*.

The principal problem which concerned the Court in the second *Konigsberg* case (*Konigsberg* v. *State Bar of California*, 366 U. S. 36), namely, that of balancing governmental against private interests, is not present here since this Court has never adopted the balancing test in a Fifth Amendment case. The dissents in the first *Konigsberg* case and the majority in the second took pains to note that no claim of Fifth Amendment privilege was involved. Thus, dissenting in the first case, Mr. Justice Harlan said:

> "There is no question here of drawing an unfavorable inference from a claim of the Fifth Amendment privilege. Petitioner repeatedly disclaimed any assertion of that privilege." 353 U. S. at 282, footnote 9.

And in the second *Konigsberg* case, the majority opinion said at p. 44:

> "We think it clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a state from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having substantial relevance to his qualification."

And again, at p. 46, the Court premised its decision on the assumption "that there is no privilege here to refuse to answer."

6. In *Stewart* v. *Dulles*, 248 F. 2d 602, the Court of Appeals held that an affidavit denying present Communist Party membership or membership for the past fifteen years complied with the passport regulations, later held to be invalid in the *Kent* case, because those regulations spoke only in terms of present Communist Party membership. Here there are no regulations at all. All three petitioners have denied present membership and Blumenthal and Jones likewise denied membership since 1958 and 1959 respectively. As the

Court held in the *Stewart* case, we think that this, at the very least, would require the Commission to hold a hearing on the eligibility of the petitioners for licenses.

## CONCLUSION

**The petition for certiorari to the Court of Appeals for the District of Columbia should be granted.**

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
30 East 42nd Street,
New York 17, N. Y.,
*Attorneys for Petitioners.*

April 15, 1963

## Exhibit A

## OPINION

## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 17208

STANLEY BLUMENTHAL, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

---

On Petition for Review of Orders of Federal Communications Commission

---

Decided March 28, 1963

*Mr. Victor Rabinowitz*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Joseph Forer* was on the brief, for petitioners.

*Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, with whom *Messrs. Max D. Paglin*, General Counsel, *Daniel R. Ohlbaum*, Associate General Counsel, Federal Communications Commission, and *Lionel Kestenbaum*, Attorney, Department of Justice, were on the brief, for respondents.

Before BAZELON, *Chief Judge*, and FAHY and WRIGHT, *Circuit Judges*.

FAHY, *Circuit Judge*: Petitioners Blumenthal, Jones and Paschal each applied to the Federal Communications Commission for a radio operator's license. Their applications were dismissed. They petition this court to review the orders of the Commission dismissing the applications. Our

jurisdiction is rested upon § 402(a) of the Communications Act, 47 U.S.C. § 402(a).

The dismissals were made on the ground that each applicant had failed to respond adequately to relevant questions, answers to which under oath had been requested by the Commission. The questions were as follows:

> 1. Are you now or have you ever been a member of the Communist Party? If the answer is yes, give dates of membership;
>
> 2. Are you now or have you ever been a member of any organization or group which advocates or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence? If the answer is yes, list the organizations or groups and gives dates of membership.

Blumenthal answered question No. 1 as follows:

> I am not a member of the Communist Party and was not at the time I applied for renewal of my second-class radiotelegraph operator's license in 1958. As to the period prior to that date, I decline to answer in accordance with the privileges granted to me under the Fifth Amendment to the Constitution of the United States.

He answered question No. 2, "No."

Jones answered question No. 1 as follows:

> I am not a member of the Communist Party and was not at the time I was first requested to execute a questionnaire by the Commission.

He also answered "No" to question No. 2.

Paschal, who applied for renewal of his amateur operator's and station licenses, in answer to question No. 1 replied:

> I am not a member of the Communist Party. In view of the manner in which existing legislation has been utilized and the attitude of various governmental agencies in prosecuting and persecuting by defacto fiat, I must utilize my right under the Fifth Amendment of

> the Constitution to refuse to give comfort or aid to any inquisitorial activity regarding any past or present political activity.
>
> He gave the same answer to question No. 2.

The Commission advised the applicants that it was unable to act upon their applications until complete answers were given. The Commission advised also that any answers given would be considered in light of all the facts and circumstances, and that the applicants might submit with the answers any information which would help the Commission in finally disposing of the applications. Blumenthal and Jones requested hearings as to the sufficiency of the applications. The requests were denied because each applicant had been afforded such a hearing in connection with his earlier application, which had been abandoned, and also because the Commission relied on the intervening decision of this court in *Borrow* v. *Federal Communications Comm'n*, 109 U. S. App. D. C. 224, 285 F. 2d 666, *cert. denied*, 364 U. S. 892 (1960), as establishing the Commission's authority to require complete answers to the questions. Blumenthal and Jones failed to avail themselves of further time allowed to complete their answers, whereupon the Commission dismissed their applications, citing Section 303(*l*)[1] of the Act and Section 1.71(d) of its Rules.[2]

---

[1] In pertinent part this statute reads as follows:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires shall . . .
>
> (*l*) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified. . . .

47 U.S.C. § 303.

[2] Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. . . .

47 C.F.R. § 1.71(d).

Paschal's application was also dismissed, on the ground that he too had not satisfactorily completed the questionnaire, the Commission citing in his case Section 1.506(b) of its Rules[3] in addition to Section 303(*l*) of the Act.

Since Jones did not invoke the Fifth Amendment his case is governed by our decision in *Borrow*, from which it follows that the order of the Commission dismissing his application will be affirmed on the authority of that case. And see *Cronan* v. *Federal Communications Comm'n*, 109 U. S. App. D. C. 208, 285 F. 2d 288, *cert. denied*, 366 U. S. 904 (1960).

As to Blumenthal and Paschal the contention is that since they invoked the Fifth Amendment their cases are distinguishable from *Borrow* and reversal is required.

This court in *Borrow*, followed in *Cronan*, decided that the questions were pertinent and relevant and that the Commission had authority to insist upon the information. Those cases further hold that First Amendment rights are not infringed by requiring answers to the questions. In *Borrow* we held that the applicant's failure to answer authorized the Commission to dismiss the application, not because the failure to answer considered alone was a reason for disqualification but because it withheld information the Commission was entitled to request and to receive; in other words, the application was not completed in important respects.

In contending that the exercise by Blumenthal and Paschal of their Fifth Amendment privilege not to answer fully, removes their cases from the controlling effect of *Borrow* and *Cronan*, appellants rely on *Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1957). There an applicant for admission to the state bar had refused to answer certain questions, and the Court held that no adverse inference as to character and loyalty could be based on such refusal. And the appellants contend that the decision in the second *Konigsberg* case, 366 U. S. 36 (1961), does not affect them adversely. In this

[3] The wording of this rule, 47 C.F.R. § 1.506(b), is the same as that of 1.71(d) set out in note 2, *supra*.

regard they rely on the following statement from the majority opinion in that case: "We think it clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications." 366 U. S. at 44. It is urged that the Court's reference to "unprivileged answers" indicates that were the answers privileged, as here, failure to answer would not lead to denial of the application as unduly incomplete. We do not feel warranted in so interpreting this statement of the Supreme Court. In second *Konigsberg* the Fifth Amendment privilege was not interposed, so we cannot say the question of a "privileged answer" was actually decided. Considering that the Fourteenth Amendment imposes upon state action the same limitations the First Amendment imposes upon federal action, the Court held in second *Konigsberg* that the questions asked did not impinge upon rights of free speech and association protected by the Fourteenth Amendment.[4] In our case, however, there is the explicit Fifth Amendment privilege to refuse to answer. Petitioners accordingly had a constitutional right not to answer, whereas Konigsberg did not have the constitutional right which he asserted. The question remaining then is whether this requires a different result in our case, notwithstanding the refusal to answer has the same effect as it had in *Konigsberg*, and in *Borrow* and *Cronan*. It withholds from the Commission the aid and cooperation of the applicant in supplying information substantially relevant to his qualifications for the license. The Commission acts under the statutory standard of public interest in granting or denying an application, and *Borrow* holds that

[4] Appellants also argue in respect to *Konigsberg* that the license there involved was one to practice law for which good character has traditionally been regarded as pertinent. This argument goes to matters we have said were decided in *Borrow*, *supra*, and which we do not reconsider.

the information sought is relevant to a decision under that standard. We think withholding the information has no less effect when withheld under the Fifth Amendment privilege than when withheld as in *Konigsberg*.

The Fifth Amendment privilege protects a person who invokes it from self-accusation; but when he seeks a license at the hands of an agency acting under the standard of the public interest, and information substantially relevant to that standard is withheld under the privilege, as may be done, the need for the information and the cooperation of the applicant with respect to it remains. The agency cannot be required to act without the information.[5] To hold otherwise would carry the privilege beyond its purpose. While its invocation may not be considered ground for disqualification, for the privilege is available to the innocent as well as to the non-innocent, the lack of relevant information which follows in the wake of its assertion leaves a gap in data which the applicant can supply. The effect is the same whether the refusal to supply it is based on the Fifth Amendment or on an unfounded claim under the Fourteenth Amendment.

Dismissal of an application for refusal of the applicant to fill the informational gap leads to an unhappy result. For it attaches significance to exercise of the privilege, and exerts pressure upon the applicant to waive it. Yet, on the other hand, there remains the inability of the Commission to obtain his help in supplying relevant information available to him. He applies for the license. The Commission cannot be required to act on his application without the relevant light he can supply and which the Commission is authorized to seek. It seems to us, therefore, that the failure to supply that light, though by resort to the privilege, is

---

[5] Nor can the Commission, it seems to us, be required to come forward with evidence against the applicants before a license may be withheld, as has been suggested in argument. Such a contention implies that the licensing procedure is in actuality a proceeding against the applicants or at least one in the nature of an action between adverse parties.

cause for dismissal of the application as incomplete in significant respects. This is not an entirely satisfactory solution of the problem. For the application is lost when resort is had to the privilege. The application is sacrified though the privilege is preserved. To save both seems impossible. The choice is that of the applicant. Although no implication of guilt attaches to use of the privilege, other and indirect consequences are not altogether avoided. We are constrained to hold that this is the result we must accept, assuming the correctness of our *Borrow* decision that the questions were authorized and relevant. See *Kim* v. *Rosenberg*, 363 U.S. 405 (1960); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), particularly at 91.

*Affirmed.*

BAZELON, *Chief Judge*, concurring: Were we writing on a clean slate, I would hold—for the reasons given in Judge Washington's dissenting opinion in *Borrow* v. *Federal Communications Comm'n*, 109 U.S.App.D.C. 224, 228, 285 F.2d 666, 670, *cert. denied*, 364 U.S. 892 (1960)—that the Federal Communications Commission is not authorized to inquire into the political beliefs or affiliations of license applicants. But the court's decision there is controlling on that issue. Given the Commission's power so to inquire, the applicant's reason for refusing to respond becomes irrelevant. I therefore concur.

## Exhibit B

## JUDGMENT

### UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1962

No. 17208

---

STANLEY BLUMENTHAL, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

---

On Petition for Review of Orders of the Federal Communications Commission

---

Before: BAZELON, *Chief Judge*, and FAHY and WRIGHT, *Circuit Judges*.

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Federal Communications Commission on review herein are affirmed.

Per *Circuit Judge* FAHY

Dated: March 28, 1963.

Separate concurring opinion by Chief Judge Bazelon.